no longer necessary; but the delay in this case was inconsequential and would only have increased the amount of the reasonable fee to be negotiated. We also agree with the Disciplinary Committee that the respondent had a duty to negotiate in good faith with Mr Kemp acting for Mr Gray. But the intransigent and uncompromising attitude of Mr Gray, in our view, left no room for any meaningful negotiations. He believed that the respondent had replaced him with another counsel under what he believed to be reprehensible circumstances and that the respondent had been dishonest about it. His belief had no evidential foundations whatsoever. Mr Gray was also under a duty of honour to negotiate in view of the fact that the criminal case against Tan Koon Swan was not proceeding. Instead, he refused to accept that the criminal case was not proceeding to trial and he persisted, without any justification, in his allegation that another counsel had been retained to appear at the trial when, in truth and in fact, Tan Koon Swan had pleaded guilty and was sentenced to a term of imprisonment for two years.

When the Disciplinary Committee finally recognized that this was essentially a dispute over the amount of the fees payable and that the respondent should negotiate, Mr Gray's totally unreasonable response made any further negotiation impossible. He continued to assert as late as 5 May 1988 that the respondent had instructed another counsel. Most inexplicably, he also through Mr Kemp introduced a new allegation that in fact the respondent had received from or for the account of Tan Koon Swan the sum of M$220,000 to cover the fees payable to Mr Gray. Finally, Mr Kemp on his instructions offered to accept £25,000 on the respondent's 'undertaking to return the balance of the fees received to your client'. It was an impossible condition for the respondent to accept, unless he had received payment from or for the account of his lay client, and at the hearing before us there was absolutely not an iota of evidence that he had.

The misfortune encountered by the respondent stemmed from a failure on the part of Mr Gilbert Gray QC in conceding or at least mentioning at the first available opportunity that it was agreed that the fee would be negotiable if the criminal case did not proceed to trial. This failure was perplexing to us as the respondent had from the start of the controversy asserted that the fee was in the circumstances negotiable. This failure was not put right until the clerk of the QC disclosed for the first time in evidence under oath before the Disciplinary Committee that at the time of the retainer he had reached that understanding with the respondent. The Disciplinary Committee in spite of their finding as a fact that there was such a term in the retainer did not take into consideration the failure and refusal of the QC to negotiate with the respondent. Instead they misdirected themselves by finding that the respondent had failed to pay the agreed fee of £50,000. In a contract of honour it is as much a matter of honour to pay as it is no less a matter of honour to negotiate in the event of a condition subsequent coming to pass. The respondent did not fail to pay the fee because it was never payable; Mr Gilbert Gray QC, in fact, failed to negotiate in any meaningful way and we have to say that his overly robust response in the matter had stood in the way of a settlement of a reasonable amount of the fee.

Order accordingly.

Solicitors: *Lee & Partners*; *B Rao & KS Rajah.*

Reported by *Seah Min Wai*

Owners of Cargo lately laden on board the Ship or Vessel 'Kota Sejarah' v Owners of the Ship or Vessel 'Kota Sejarah'

HIGH COURT (SINGAPORE) — ADMIRALTY IN REM NOS 387 OF 1981 AND 870 OF 1980
CHAN SEK KEONG J
10 AUGUST 1990

Shipping — Bills of lading — Right of shipowners to tranship cargo after abandoning voyage — Interpretation of bill of lading clause

Tort — Conversion — Whether defendants entitled to tranship cargo against plaintiff's wishes under the terms of the bill of lading — Whether transhipment amounted to conversion

Tort — Detinue — Whether there was detinue because defendant refused to unload cargo despite plaintiffs' demand

Bailment — Whether cargo was lost without defendants' negligence — Onus of proof on defendants — Whether s 271 of Merchant Shipping Act (Cap 179, 1985 Ed) applicable — Merchant Shipping Act (Cap 179, 1985 Ed), s 271

The plaintiffs bought a cargo of jute from Thai sellers and resold the same to an Iranian-controlled German company for delivery at Khorramshahr, Iran. The defendants' ship Kota Sejarah loaded the goods against two clean bills of lading (KR-3 and KR-4), sailed from Bangkok on 6 January 1979 and arrived at Basrah, Iran, on 26 January 1979. Due to congestion caused by a stevedores' and port workers' strike on account of political unrest, the ship could not berth at Khorramshahr. After two weeks at Basrah, the defendants invoked cl 5 of the bills of lading, abandoned the voyage and selected Porbander, India as the port of discharge.

On 13 February 1979, the plaintiffs telexed the defendants that the Iranian buyers had rejected the invocation of cl 5 and held the defendants responsible for all consequences.

On 6 March 1979, the plaintiffs' director (PW1) met JM's director (DW1) (JM being the defendants' agent) and discussed various matters relating to the cargo. On 9 May 1979, the plaintiffs tried unsuccessfully to telex the defendants about the current position relating to the ownership of

the cargo. The plaintiffs telexed JM the next day to relay a message to the defendants that they are the holders of the bills of lading and owners of the cargo resulting from a situation in which the buyers have defaulted and they are in the process of reselling the cargo elsewhere and that the defendants are to instruct JM not to remove the cargo without the plaintiffs' written approval. JM relayed the message on the same day.

On 11 May 1979, the defendants telexed the plaintiffs that, inter alia, it was too late to comply with their request as the cargo had been loaded on the Kota Agung destined for Khorramshahr. The plaintiffs then telexed JM that they did not want the cargo to be loaded. JM replied that the cargo had been loaded, the ship was sailing the next day and the cargo could not be discharged, even at the plaintiffs' expense. The plaintiffs then replied that as the defendants had declared Porbander as their final port of discharge under cl 5 of the bills of lading, they are holding all parties concerned responsible for loading the cargo without their approval. They further protested and reserved their right to take all legal action against all parties concerned as PW1, in the meetings with DW1, had explained the plaintiffs' position and arranged for insurance etc for warehousing the cargo.

The plaintiffs then telexed the defendants to put on record, inter alia, that the defendants had declared Porbander as the final port of discharge; JM had been informed of the plaintiffs' ownership of the cargo and no one should deal with the cargo without their prior written approval; and PW1 had met DW1 in Bombay on two occasions and the latter had agreed nothing will be moved without the plaintiffs' written approval. The plaintiffs further insisted that the defendants off-load the cargo and held the defendants responsible for all consequences, losses etc.

After checking with JM, the defendants telexed the plaintiffs on 12 May 1979 that the plaintiffs had never responded to their earlier telexes asking for instructions whether they or the receivers wish to make any arrangement for forwarding the cargo to Khorramshahr and they therefore made arrangements to forward the cargo to Khorramshahr. The defendants further stated that they were never aware of the plaintiffs' claim as owners and that JM agreed (which is denied) not to remove the cargo from Porbander without the plaintiffs' written approval. To assert title to the goods, the defendants insisted that the plaintiffs must present the relevant bills of lading or alternatively furnish the defendants with an indemnity guaranteed by a Singapore bank in order that the defendants can comply with their request for delivery.

By a further exchange of telexes between the plaintiffs' solicitors and the defendants, the defendants were informed that the plaintiffs were unable to find a buyer in Khorramshahr and the cargo must not be discharged at that port but be returned to Porbander or shipped to Singapore or Bangkok. The defendants replied that they did not admit the plaintiffs' title to the goods unless bills of lading were presented to them and that they will deliver the goods to the party presenting valid bills of lading.

Various allegations and counter-allegations were exchanged between the parties, the net result of which was that the parties reached an agreement, without prejudice, to have the goods reshipped to Bangkok at an agreed freight rate.

Unfortunately, the Kota Agung, on arrival in Khorramshahr, caught fire in the course of unloading its cargo, resulting in the total constructive loss of the goods. The plaintiffs sued the defendants for the loss and damage to their cargo.

Held, allowing the plaintiffs' claim:

(1) The abandonment of a voyage resulting from the occurrence of a supervening event as prescribed by the contract of carriage results in the termination of the contract and in such an event the right or power of the shipowner to reship the goods ceases unless such a right is expressly reserved in the contract or the master acts as an agent of necessity. The defendants have not put their defence on the basis that they were acting as agents of necessity. If they had done so, the defence would also fail as it is not disputed that the defendants failed to communicate with the plaintiffs when they could have done so long before they decided to load the goods on board the Kota Agung.

(2) The crucial question (pertaining to cl 5 of the bills of lading) is whether the power to tranship the goods is cumulative with or alternative with the power to abandon the voyage. As a matter of construction, cl 5 did not permit the defendants to tranship the goods to Khorramshahr after the defendants had elected to abandon the voyage and discharged the goods at Porbander.

(3) The defendants had no authority to load the goods on the Kota Agung unless the plaintiffs had requested transhipment. Silence does not express consent. There is no implied agreement to tranship.

(4) The question of the defendants reserving their right to tranship also does not arise. Assuming that cl 5 gave such a right, the defendants made no such reservation which was communicated to the plaintiffs. The evidence shows that the defendants' intention in invoking cl 5 was to abandon the voyage (which they effected by discharging all the cargo at Porbander). Further, on a balance of probabilities, PW1 did not expressly instruct DW1 concerning the removal of the goods from the warehouse at Porbander.

(5) Detinue is still a common law tort in Singapore and has not been, unlike in England, abrogated by statute and converted into a form of statutory conversion. As PW1 had not at any time prior to 11 May 1979 expressly instructed DW1 not to remove the goods from the warehouse, the defendants had not done anything wrong in relation to the goods at the time of removal and up to the time it was loaded on board the Kota Agung. Further, on the evidence, there was no detinue as the defendants did not actually refuse to deliver the goods to the plaintiffs.

(6) Assuming that cl 5 did give the defendants a contractual right or power to tranship after abandonment of a voyage, it is still necessary to consider whether this power was capable of being revoked by the defendants at any time before it was exercised. In principle, the right or power is revocable. After the abandonment of the voyage, the owners of cargo are entitled to take the goods at the place where the goods are landed. An irrevocable power to tranship to the abandoned port of discharge is consistent with the rights of the owners. On the evidence, the defendants' right or power to tranship was terminated on 11 May 1979 when the Kota Agung was still loading the remainder of the goods. Further, none of the acts leading to and including the transhipment of the goods were forced upon the defendants by any circumstance. The transhipment was entirely voluntary.

(7) The defendants intended to deny the plaintiffs' right (to prohibit transhipment) and also at the same time asserted a right (to tranship) inconsistent with the plaintiffs' right to prohibit it. Not only that, the evidence shows that the defendants in transhipping the goods intended to charge freight and to claim a lien on the goods for freight. This was clearly an

intention to assert dominion over the goods until it was delivered to the plaintiffs. The transhipment was sufficient to constitute conversion.

(8) On the evidence, the defendants had no right to retain possession of the goods on board the Kota Agung. Their wrongful possession constituted trespass to the goods. The goods were lost whilst they were still in unlawful possession. The defendants' position was that of insurers and in the event that happened, the defendants were liable for the loss of the goods, whether or not they were negligent.

(9) The law on bailment is well established. The onus is on the defendants to establish that the goods were lost without their negligence. The master was negligent or in breach of duty in not closing the hatches during the lunch break or leaving it open for a long period of time. In any case, the defendants failed to discharge the onus of proving the probable cause of the fire and, has not discharged the onus of proving that their servants were not negligent in allowing the fire to occur in the circumstances it did.

(10) The defendants' duty was to keep the goods in the warehouse at Porbander until the plaintiffs took possession of it. In insisting on keeping the goods on board the ship and delivering the goods at Khorramshahr, the defendant did so at their own risk and became insurers of the goods.

(11) Section 271 of the Merchant Shipping Act has no application in the present case where the cargo is carried on board a ship without the cargo owner's consent. The section has no application except where the goods are lawfully taken in or put on board a Singapore ship.

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeal No 78 of 1990]

Cases referred to

1 *Barker* v *Burns Philp & Co Ltd* (1944) 45 SR (NSW)1 (folld)
2 *Howard E Perry & Co Ltd* v *British Railways Board* [1980] 2 All ER 579 (refd)
3 *Mitchell* v *Ealing London Borough Council* [1979] 1 QB 1 (folld)
4 *Port Swettenham Authority* v *Wu* [1979] AC 580 (folld)
5 *Philips & Co (Smithfield) Ltd* v *Clan Line Steamers Ltd* (1943) 76 Lloyd's LR 58 (folld)
6 *The 'Lady Gwendolen'* [1965] P 294 (refd)
7 *Asiatic Petroleum Co Ltd* v *Lennard's Carrying Co Ltd* [1915] AC 100 (refd)
8 *Tempus Shipping Co Ltd* v *Louis Dreyfus & Co Ltd* [1930] 1 KB 699 (refd)
9 *Virginia Carolina Chemical Co* v *Norfolk & North American Steam Shipping Co* [1912] 1 KB 229 (refd)
10 *The 'Rostellan'* (1929) 35 Lloyd's LR 117 (refd)
11 *Beauchamp* v *Turrell* [1952] 2 QB 207 (refd)
12 *Pendle & Rivett Ltd* v *Ellerman Lines Ltd* (1929) 27 Lloyd's LR 133 (distd)

Legislation referred to

Merchant Shipping Act (Cap 179, 1985 Ed) s 271

HC Hiew (*Nicholas Woo* with him) for the plaintiffs.
GP Selvam (*Anjali Iyer* with him) for the defendants.

Cur Adv Vult

Chan Sek Keong J: In August 1978, the plaintiffs agreed to buy 1,000 metric tons of jute from a Thai company, and at about the same time agreed to sell the same goods to a German company controlled by Iranians for delivery to Khorramshahr in Iran. Cargo space was booked on the defendants' vessel, the Kota Sejarah, and the goods were loaded on board on 3 January 1979. Two clean bills of lading ('KR-3' and 'KR-4') were issued for the goods. The ship was also carrying other jute for another consignee in Khorramshahr. The Kota Sejarah sailed from Bangkok on 6 January 1979 and arrived on or about 26 January 1979 at Basrah, a port situated across the Shatt al-Arab waterway from Khorramshahr. Due to congestion arising from a stevedores' and port workers' strike on account of the then political unrest in Iran, the ship could not get into Khorramshahr to await berthing for discharge of the goods. After waiting for about two weeks in Basrah, the defendants decided to invoke cl 5 of the bills of lading. They telexed their agents in Bangkok to inform the shippers of their decision as follows:

> In view of the condition now prevailing in Iran and stevedore strike at Khorrmshhr which prevent discharge of cargoes..., owners hereby give notice that they are obliged to invoke cl 5 of the said bills of lading n accrdgly are proceeding to disch the said cgo at Mina Qaboos or any other convenient ports. You and all intrstd parties are hereby invited to make arrangements concerning storage n on carriage of the said cargo so discharged. The cgo owners are advsd to insure the cgo pending on carriage, if necessary.

On 2 February 1979, the plaintiffs telexed the defendants for information on the itinerary of the Kota Sejarah and on 3 February 1979 (BD45) the defendants telexed their reply in which they quoted the above quoted telex and further said:

> FYI most likely the cgo to be dischd at Porbander... Pls note as we are responsible to the port authorities for storerent charges, we place lien on cgo.

The defendants in fact selected Porbander on the west coast of India as the port of discharge and so informed the plaintiffs who then requested a refund of the freight. The defendants rejected the request on the ground of extra expenses incurred by the diversion and told the plaintiffs' agents to contact the defendants' agents in India, James Mackintosh & Co Ltd ('JM'), in order to arrange delivery of the goods.

On 13 February 1979, the plaintiffs telexed (BD57) the defendants that the Iranian buyers had rejected the invocation of cl 5 and for that reason would hold the defendants responsible for all consequences. On 19 February 1979, the plaintiffs telexed (BD62) JM informing JM that they were the holders of B/Ls KR-3 and KR-4 and inquiring about, inter alia, the insurance of the goods. The plaintiffs repeated this in their telex of 26 February 1979 (BD64) and also informed them that their managing director would be going to India. On 1 March 1979, the defendants telexed a reply (BD77) that because of the difficulty in obtaining insurance

cover except for fire, lightning, explosion and flood, the 'receivers' should arrange their own insurance. The defendants also inquired of the plaintiffs whether they or the receivers wished to make their own arrangements for forwarding the goods to Khorramshahr or to arrange with JM on their behalf and further requested that they be advised as to what the receivers intended in regard to the forwarding of the goods and on the insurance.

On 6 March 1979, SM Gourisaria (PW1), a director of the plaintiffs, was in Bombay. He met PJ Dalal (DW1), a manager with JM. They had a discussion on various matters relating to the goods. PW1 was told that the goods were stored in a bonded warehouse, the cost of storage, transport, wharfage, the rates of transhipment, and potential buyers of jute in the region. There are material disputes on what was said by each party or agreed between them. I shall deal with the evidence later on. From Porbander, PW1 went to Calcutta to see the Indian Jute Commissioner. From there he went to Dacca and then back to Bombay by the end of March where he met DW1 again. He returned to London at the beginning of April.

After that there was no further contact between the plaintiffs and the defendants or JM. On 9 May 1979, the plaintiffs tried to telex (BD86) the defendants of the current position relating to the ownership of the goods but were unable to do so. On 10 May 1979, they telexed JM the message they had wanted to send which JM agree to do. The message was as follows:

> Pls note that we as holders of the bills of lading referred to above hold entitlement to and are owners of the goods resulting from a situation in which our buyers have defaulted stop we are in process of selling these goods elsewhere and as such ask you to instruct your agents in India, James Mackintosh Co Pte Ltd, Bombay not to remove cargo without our written approval and if and when we are able to sell these goods we will then give them the necessary instructions for the appropriate release in yr favour or at our direction stop needless to say we will be responsible for storage charges in Porbander. Kindly confirm.

JM was able to relay the message to the defendants on the same day. On 11 May 1979, the defendants telexed (BD91) the plaintiffs that their telex had been out of order for two days, that it was too late to comply with the request as the goods had already been loaded on the Kota Agung sailing for and estimated to arrive at Mina Qaboos on 14 May 1979 and departing for Khorramshahr on 17 May 1979, and that they were prepared to unload the cargo at Mina Qaboos if permitted and subject to payment of all storage charges incurred at Porbander and at Mina Qaboos. On the same day, the defendants sent a telex to their agents at Khorramshahr to check from the consignees whether they had no further interest in the goods.

On receipt of the defendants' telex, the plaintiffs telexed JM on the same day that they did not want the cargo to be loaded. JM replied in the same telex that the cargo had been loaded, that the ship was sailing on the next day (12 May 1979) and that the cargo could not be discharged, even at the expense of the plaintiffs. At that point in the telex, the plaintiffs said:

> ... We must point out that Pilship declared Porbander as their final port of discharge under cl 5 of their B/L we are holding all parties concerned responsible for loading this cargo without our approval we are now informing Pilship of the same that is if their telex still working in meantime through you we register our protest that what has been done is completely contrary to all known marine laws this is a serious matter and we reserve our right to take all legal action against all the parties concerned in this matter Mr Gourisaria our director had two meetings with Mr Dalal where all above was explained and even insurance etc for warehousing was done by us no one has any right to move our cargo without our prior permission.

On the same day, the plaintiffs sent the following telex (BD98A) to the defendants:

> We are completely shocked and surprised by the content of your telex. We put on record:
>
> (1) You declared Porbander as your final port of discharge.
> (2) You told us to do the needful.
> (3) We informed Mackintosh that we are the owners of the cargo and no one should do anything with the cargo without our prior written approval.
> (4) Our director Mr Gourisaria met Mackintosh executive Mr Dalal in Bombay on two occasions and he agreed that nothing will be moved without our written approval.
>
> We must insist that you telex Bombay and offload the cargo and leave it as it was where it was because in the first instance you said that Porbander is the final port of discharge. We find it most unethical, most unbusiness-like and contrary to all known trade practice that you took this decision unilaterally if we do not receive a satisfactory answer from you we are hereby holding you responsible for all consequences, losses etc and instructing our lawyers to take necessary action against your company.
>
> In the meantime you are responsible for all the insurances etc on our above cargo.
>
> Please acknowledge clear receipt of this telex.

On receipt of this telex, the defendants informed JM of its contents and asked JM for an explanation as to the allegation that JM had committed to the cargo owners as alleged by the plaintiffs. On 12 May 1979, the following telex was sent to the plaintiffs:

> We refer to exchange of tlxes ending with ours of 1/3 to u for instructions whether u or yr receivers wish to make any arrangement for onfrwarding to K'shahr or wish our agts to arrange on their behalf. No reply was recvd by u.
>
> We thfore made arrangements to onfrwrd by our vsl K Agung. Almost all consignees hv given grntee to our K'shahr agts to cover all t/shipmnt expenses including freight n storage charges at Porbander at USD60 per ton.
>
> We were never aware before of yr claim as ownrs of the consignmnts nor were we aware tht our Bombay agts had

agreed which is denied, not to remove the cgo fm Porbander without yr written approval.

To assert yr title to the goods u must realize tht u hv to present relevant Bs/L in order tht we can comply with yr reqst.

If u wish to hv delivery of the goods u must present the Bs/L to us or give us an indemnity, grnteed by a Spore bank to cover the full value of the goods n all charges n expenses of reshipmnt.

Kindly advise what yr intentions are.

We must say yr remarks that our 'conduct were unethical, most unbusiness-like' is unwarranted.

On the same day, Penningtons, the London solicitors for the plaintiffs telexed the defendants setting out what they claimed to be the legal position of their clients, and informing the defendants that the plaintiffs had approached buyers to renegotiate the purchase. On 16 May 1979, Penningtons telexed the defendants that the plaintiffs had failed to find a buyer in Khorramshahr and that the cargo must not be discharged at that port but to be returned to Porbander, but that they would not mind the cargo being shipped to Singapore or Bangkok.

On 17 May 1979, the defendants telexed Penningtons to say that they did not admit that the plaintiffs were entitled to the goods unless the bills of lading were presented to them and that the goods would be delivered to the party who presented valid bills of lading. On 24 May 1979, the plaintiffs through their solicitors, replied to Penningtons. Thereafter allegations and counter-allegations were exchanged, the net result of which was that the parties reached an agreement, without prejudice, to have the goods reshipped to Bangkok at an agreed freight rate. Unfortunately, there was no happy ending to the dispute as the Kota Agung, after arrival in Khorramshahr on 17 June 1979, caught fire on 9 July 1979 in the course of unloading its cargo, resulting in the total constructive loss of the goods. Hence this action.

Issues

A number of matters in dispute in the pleadings were agreed at the start of the trial. They were (a) that the plaintiffs were the owners of the goods at the time of the reloading at Porbander; (b) that the defendants had properly invoked cl 5 of the relevant bills of lading; and (c) that the Carriage of Goods by Sea Act (Cap 33 1985 Ed) had no application to the transhipment of the goods. The issues which arise from the pleadings in the amended statement of claim and which I have to consider are as follows:

(1) paragraph 4(c): whether the defendants wrongfully and/or contrary to and in breach of the specific instructions of the plaintiffs removed the goods from the godown at Porbander and transhipped the same on board the Kota Agung;
(2) paragraph 4(d): whether the removal and transhipment constituted conversion of the plaintiffs' goods;
(3) paragraph 4(e): alternatively, whether the defendants were in breach of duty and/or negligent in the performance of the transhipment when the cargo was lost by fire on board.

Issue 1

The first issue requires a consideration of the following questions:

(i) as a matter of law, whether the defendants had the power to tranship the goods;
(ii) if they had, whether their power to do so was expressly terminated by the plaintiffs when PW1 met DW1 in Bombay, and if not;
(iii) whether such power was terminated on 11 May 1979. I shall consider the first question after I have dealt with the other two questions.

(i) Did the defendants have the power to tranship?

The defendants' case is that they had a right to tranship the goods even after they had abandoned the voyage. They have put their case on different and not necessarily consistent footings. First, they say that cll 5 and 10 of the bills of lading permitted them to do so even after the abandonment of the voyage. Secondly, they say that when they made the decision to abandon the voyage, they also, at the same time, decided to reserve the right to tranship the goods. It is not clear whether the second argument is founded on the general law or on the terms of the bills of lading. If on the bills of lading, as I think it is, it would suggest that cll 5 and 10 are open to two different constructions, one where the right or power to tranship is permitted without reservation and the other with reservation. Before I turn to these clauses, I think it will be useful to set out by way of background the general law governing an open contract of carriage.

The right or power of the shipowner to tranship cargo to its contractual destination arises in different circumstances as set out in 43 *Halsbury's Laws of England* (4th Ed) para 626 is as follows:

> Different kinds of transhipment. As the contract of carriage usually implies a term that the cargo is to be carried to its destination in the same bottom, it is necessary to consider how far the rights and liabilities of the parties are affected by the transhipment of the cargo during the voyage, in order that it may be carried to its destination in another ship. For this purpose three kinds of transhipment must be distinguished, namely, (1) transhipment under a liberty reserved in the contract; (2) transhipment in the interest of the shipowner after the ship has been disabled from continuing her voyage; and (3) transhipment in the interests of the cargo owner after the voyage has been abandoned.

The present case does not concern a transhipment of the second kind referred to in the said passage. It is not clear that it is a case of the third kind although counsel has advanced arguments on the facts which suggest that the defendants may also be relying on this kind of transhipment. So I shall deal with it. Briefly, the submission is that the abandonment of the voyage is not the abandonment of the goods and that the defendants did ask the plaintiffs for instructions as to what they wished to do when the goods landed at Porbander.

Under the general law, the abandonment of a voyage in consequence of a supervening event making it impossible for the shipowner to deliver the cargo to the consignees at its contractual destination leaves the goods in the de facto custody of the master. He becomes an agent of necessity and has a duty to protect the cargo until it can be discharged and, if necessary, warehoused until it can be delivered to the owners or to be dealt with on their instructions. The master may also tranship the cargo at once, without communicating with the owners, if the circumstances justify such a decision and if immediate transhipment is reasonably justifiable as being the most beneficial course to take: see 43 *Halsbury's Laws of England* (4th Ed) para 634 (where two examples are given, where the goods are perishable and where the ship is in danger of floundering and is met by another ship to which they can be transhipped). In such a case the master enters into the contract of transhipment as agent for the owners and not for the shipowner. Except in these circumstances, the master may not tranship the goods without obtaining the consent of the owners where it is reasonably possible to communicate with the owners to obtain such consent.

The decision of the Full Court of the Supreme Court of New South Wales in *Barker* v *Burns Philp & Co Ltd*[1] is a useful illustration of the duties of a master where the contract of carriage is frustrated by a supervening event. B & Co (the plaintiffs) shipped, freight prepaid, bags of flour on board a ship owned by BP (the defendants) to consignees at Singapore, Malacca and Penang. Enroute the ship called at Batavia (now Jakarta) three miles from the berthing area where it awaited permission to discharge its cargo. Shortly afterwards, Batavia was bombed and the master received news that Singapore had fallen to the Japanese. The master tried unsuccessfully to communicate with BP through military channels but did not attempt to communicate with BP through the local wireless or cable offices, although in fact such communication was possible. On the eleventh day after arrival, he was told to go to berth but owing to the chaotic shore conditions and the deterioration of the war position, resulting in lack of shore assistance for discharging and the length of time it would take to do so, he decided to take the cargo back to Sydney. He also formed the view that the cargo would be lost if it was discharged at Batavia. The ship arrived in Sydney on 2 April 1942 with the flour still on board. B & Co were advised that he had to pay half the original outward freight to obtain the flour. B & Co paid the back freight under protest and without prejudice to their rights and commenced an action to recover the back freight on the ground that the master had no authority to carry the cargo back to Sydney without the authority of the owners and if they did have authority under the bill of lading back freight was not chargeable.

The Full Court held, by a majority, that BP were not entitled to back freight. The court was unanimous that the master had abandoned the voyage but each member of the court took a different view of what the rights of the shipowner thereafter. Jordan CJ (and it would appear that Davidson J agreed with him on this point) held that there was nothing in the bill of lading which expressly authorized the master to carry the cargo back to Sydney after abandonment. Jordan CJ then considered the general law and held that the master, in failing to communicate with the owners of the goods when it was reasonably possible to do so in order to obtain their sanction, acted without authority. Davidson J, however, held that in the conditions then prevailing the master could not reasonably have communicated with the owners when he decided to ship the cargo back in the interest of the owners. Street J held that the bill of lading did authorize the back carriage but that its terms disentitled the defendants to back freight.

Jordan CJ, after considering the terms of the bill of lading and the general law, said:

> The rights and duties of the carrier in this respect are always subject to the provisions of the contract of carriage; and hence it is necessary in the present case to refer to the bill of lading. There can be no doubt that the course taken by the ship from its leaving Sydney on 13 December 1941, to its putting into the roadstead at Batavia on 8 February 1942, was all in the fulfilment of the contract voyage. This is provided for by the last of the clauses added on the front of the bill of lading. Upon his arrival at Batavia, the master obviously regarded the entering of or discharging in the ports of discharge, Singapore, Penang and Malacca, as being unsafe and likely to prejudice the interests of the vessel and her cargo. He was therefore authorized by cl 3(e) printed on the back of the bill of lading to land the goods at the vessel's most convenient port selected by him; and if he had done so at Batavia (as he at first intended) this would have constituted due delivery under the bill of lading, because the clause expressly so provides. However, he did not do so. Before he had an opportunity, the war position had so deteriorated that he formed the opinion that if he discharged the goods there they would probably be lost, and he therefore decided to take them back to Sydney, the port from which they had been consigned. I do not think that this course is provided for by the endorsed cl 3(e) or 3(h). These, I think, contemplate the landing of the cargo at some port or ports reached in the course of the voyage to the port of destination, a landing which is agreed to constitute due delivery under the bill. They do not

contemplate a new voyage undertaken after the abandonment of the contract voyage, and a landing after the new voyage. Nor does added condition No 1 on the front of the bill of lading touch the point. This is directed to temporary storage of goods in contemplation of the commencement or continuance of the voyage contracted for. I think that the proper inference from the evidence is that at Batavia the master ultimately decided to abandon the voyage. This he was entitled to do under the added condition No 2 on the front of the bill, a condition which authorizes him, when a state of war exists, either to abandon the voyage or to alter the route and proceed to the port of discharge by a different route. If he adopts the latter course he is performing the intended voyage in a varied but permitted manner. If the former, the voyage is abandoned, and the question arises as to what is to be done with the goods. No provision is made for this in the special added war provision. In cl 9 of the ordinary provisions, it is provided that if on arriving at the port of destination the master is prevented from discharging the goods for certain reasons, he may take them back to the port of shipment or land them at any other port at the risk and expense of the owner of the goods. But no such provision is made in relation to an abandonment of the voyage under the special war clause No 2. In my opinion, therefore, the position at Batavia was that the master was entitled, without reference to the owner of the goods, to land them there and also to abandon the voyage, if he thought this best in the interests of all parties, but that, he having abandoned the voyage, there was nothing in the bill of lading which entitled him to carry them to some other port without communicating to the owners of the goods (if it were reasonably possible to do so with a reasonable expectation of receiving a timely answer) such reasonably adequate information of the nature of the emergency and of the nature of, and reasons for, his proposed action, as it was reasonably possible for him to give, and obtaining their sanction. He was therefore not justified in taking the course which he did without instructions from them, unless (i) it was both necessary and reasonable so to carry the goods in what he might reasonably regard as the best interests of the shippers and (2) it was not reasonably possible for him to communicate with them, in circumstances giving a reasonable expectation that an answer would be received in time, or, if such communication was possible, and was had, no sufficient instructions were received in time to give him a reasonable opportunity of complying with them before it became necessary to act. In other words, I am of opinion that there is nothing in the bill of lading which takes the case out of the general law. It now remains to apply it.

Barker's case[1] is an application of the general principle that the abandonment of a voyage resulting from the occurrence of a supervening event as prescribed by the contract of carriage results in the termination of the contract and that in such event the right or power of the shipowner to ship the goods back to Sydney ceases unless such a right is expressly reserved in the contract or the master acts as an agent of necessity. The defendants have not put their defence on the basis that they were acting as agents of necessity. If they had done so, the defence would also failed as it is not disputed that the defendants failed to communicate with the plaintiffs when they could have done so long before they decided to load the goods on board the Kota Agung.

The relevant provisions of the bills of lading, ie cll 5, 10 and 14, read:

> 5 If the...discharge or delivery is impeded...by...labour regulations lockouts strikes or disturbances...or by absence from any cause of facilities for...discharge or delivery or congestion or difficulties in...discharge the carrier...and/or the Master may (if in his or their uncontrolled discretion he or they think it advisable) at any time...after the commencement of the voyage abandon *or* suspend the voyage *or* alter or vary or depart from the proposed or advertised or agreed or customary route *and/or* delay or detain the vessel at or off any port or place *and or* tranship and forward subject the provisions of cl 11 hereof *or* put into hulk lighter or craft or land or store or otherwise dispose of the cargo at any port without being liable for any loss or damage whatsoever directly or indirectly sustained by the owners of the goods and all at the risk and expense of the owners of the goods. Anything done or not done by reason of or in compliance with the provisions hereinbefore contained or any of them shall be deemed to be within the contract voyage... .
>
> 10 Transhipment and Forwarding. ...The shipper or consignee constitutes the carrier his agent to enter into contracts with others for the...subsequent transport of the goods and/or storing transhipping or otherwise dealing with them...without responsibility for any act neglect or omission on the part of the carrier...If the goods cannot be forwarded immediately to destination any charges incurred for storage shall be borne by the owners of the goods.
>
> 14 Where customs at port of transhipment or delivery require any bond or undertaking before permitting the landing or forwarding of dutiable goods the carrier, master or agents are hereby authorized to give such undertaking on behalf of owners of the goods who shall indemnify the carrier from all risks and expenses incurred. The carrier and/or master porter are authorized by the owners of dutiable cargo at any port, during and after discharge, at their sole discretion, to incur and pay customs charges for watching such cargo which charges the owners thereof undertake to pay, any custom of the port to the contrary notwithstanding.

Although cl 5 refers to cl 11, counsel for the defendant says that it is an obvious typesetting error and that the correct reference is cl 10. I do not consider this a material point and will therefore assume that there is such an error. Beyond contending that the said clauses allowed the defendants, after an abandonment of the voyage, to tranship the goods without having to communicate with the plaintiffs, counsel for the defendants has made no attempt to analyse the structure of cl 5. It is clear that cl 5 reserves to the defendants a number of options to take if the discharge of cargo is hindered by the occurrence of any of the prescribed events. The defendants may abandon the voyage, or suspend it or delay it. They may also discharge the cargo, presumably after an abandonment or a suspension of the voyage. They may also tranship the goods. However, the crucial question is whether the power to tranship the goods is cumulative with or alternative with the power to abandon the voyage. Counsel has not made any submission on why cl 5 should be construed so as to reserve to the

defendants the power to tranship the goods after they, in abandoning the voyage and discharging the goods at Porbander, had fulfilled their part of the contract. In my view, and having regard to the general law, cl 5 cannot be so construed. Such a construction will enable the defendants to decide on a conditional abandonment, a concept which will lead to great inconvenience to cargo owners. I am not aware of any authority giving effect to such a concept. If there is any doubt about the meaning of cl 5, it should be construed against the defendants. There is, I think, no inconsistency between the power to suspend or delay or alter the voyage and the power to tranship the cargo. This was not what the defendants purported to do. The voyage having come to an end at Porbander, there was nothing in cl 5 which gave the defendants the power to on-carry the goods to any other place. The situation is analogous to that in *Barker*'s case.[1] There, Jordan CJ found (and with whom Davidson J agreed) that the bill of lading did not authorize BP to back-carry the cargo to Sydney. Here, I find as a matter of construction that cl 5 did not permit the defendants to tranship the goods to Khorramshahr after the defendants had elected to abandon the voyage and discharged the goods at Porbander.

This finding also answers the submission of counsel for the defendants that because the plaintiffs had failed to communicate with the defendants prior to loading the goods on board the Kota Agung, the defendants were entitled to do so for the purpose of transhipment. The defendants had no such authority unless the plaintiffs had requested the transhipment. Silence was not express consent. In any case, the request was made long before the transhipment and could not be read as an implied agreement to tranship.

Counsel for the defendants has also submitted that the abandonment of the voyage did not amount to the abandonment of the goods. That is correct, but I do not see how that helps the defendants. The circumstance that the defendants were in de facto possession of the goods gave them no authority to tranship the goods except as an agent of necessity, and even then, they would have to notify the plaintiffs as it was possible to do so.

On the construction I have given to cl 5, the question of the defendants reserving their right to tranship also does not arise. I also find as a fact that, assuming that clause gave such a right, the defendants made no such reservation which was communicated to the plaintiffs. Counsel has referred to the telexes, viz BD45, BD53, BD54 and BD63 which, in his view, showed that the defendants merely invited the plaintiffs to make arrangements to on-carry the goods to Khorramshahr without relinquishing their right to do so. It is also suggested that BD53 was evidence of the fact that the defendants were requested to take delivery of the goods at Khorramshahr at some later stage after the abandonment. I do not accept this submission for two reasons. First, I do not agree with the meaning put on these telexes by counsel. In my view, they meant and were intended (and were reasonably understood by the plaintiffs) to mean that the voyage had been abandoned and that Porbander was the final port of discharge. BD53 was a confirmation that the plaintiffs had been told to take delivery of the goods where they would be discharged after abandonment (which was Porbander) and BD63 contained a clear direction to the defendants' agents in Khorramshahr to inform consignees/cargo owners that if they wanted to have the cargo shipped to Khorramshahr, they should ask the defendants' agents (at Porbander) to act on their behalf to effect the transhipment. BD70 is a telex dated 26 February 1979 from the plaintiffs' agents in Khorramshahr to JM asking for freight rates to Khorramshahr with a view to informing the consignees and obtaining their consent to arrange the transhipment. In my view, the evidence shows that the plaintiffs' intention in invoking cl 5 was to abandon the voyage (which they effected by discharging all the cargo at Porbander).

(ii) Did PW1 instruct DW1 not to load goods or to tranship?

Although I have found that the defendants had no power to tranship the goods after the voyage was abandoned, it is still desirable, in case my construction is successfully challenged on appeal, that I decide the issue as to whether or not PW1 did instruct DW1 not to remove the goods from the godown at Porbander or tranship the goods to Khorramshahr. There is no contemporaneous documentary evidence to prove PW1's assertion and DW1's denial of the matter. My finding on this is that on a balance of probabilities, PW1 did not expressly instruct DW1 concerning the removal of the goods from the warehouse at Porbander. Here are my reasons:

(a) the plaintiffs were informed on 3 February 1979 that the goods would not be discharged at Khorramshahr: on 8 February 1979, they sent the B/Ls and the relative bills of exchange to State Bank of India, London ('SBI') for presentment to the consignees in Hamburg: SBI mailed the documents on 13 February 1979 to Deutsche Bank, Hamburg ('DB'): the notary's protest was made on 8 March 1979 and so the B/Ls must have been rejected by the buyers on or about 7 March 1979;

(b) when PW1 went to Bombay on or about 5 March 1979 he believed that the voyage had been abandoned by the defendants pursuant to cl 5 of the B/L and that he had to take delivery of the goods at Porbander: PW1 went to Porbander to arrange for shipment to the consignees as the latter had not yet defaulted;

(c) for the said reasons, when PW1 inquired of DW1 of freight, bunker and congestion rates, it was in relation to Khorramshahr: this is consistent with the evidence of DW1 that the information given by him were applicable only to Gulf ports and not Karachi;

(d) at the end of March 1979, PW1 went back to Bombay and spoke to DW1 again: by this time, PW1 would have known of the rejection of the B/Ls by the Iranian buyers: it was probably on this occasion that PW1 mentioned to DW1 that he wanted to dispose of the cargo in India, but PW1 did not in his testimony say it was on this occasion that he instructed DW1 not to remove the plaintiffs' cargo without prior notice or consent to the plaintiffs: PW1 then returned to London and for more than a month did not contact the defendants or JM: the probable reason is that pending their negotiations with the Iranian consignees to accept the goods, it was more convenient to leave them at Porbander: it was only on 10 May 1979 that the plaintiffs (having failed to contact the defendants) contacted JM to relay instructions to the defendants to instruct JM not to remove the cargo without their written consent: this telex would be entirely unnecessary if it were true that PW1 had already instructed DW1 not to do so or if DW1 had agreed not to do so;

(e) about 22 May 1979 (BD123), Penningtons telexed the defendants and claimed that PW1 had records of points of discussion (which included PW1's confirmation that the cargo was not to be removed); this claim was repeated in Pennington's telex of 29 May 1979 to the plaintiffs which also claimed that the plaintiffs had a witness and that the matters discussed had been annotated; these claims were not made good when PW1 gave evidence as all he could produce was BD78 which contained his jottings of warehousing and freight rates etc.

Issue 2: Conversion/Detinue

I turn now to the claim in conversion. The plaintiffs rely on the first two of the three forms of conversion described in 45 *Halsbury's Laws of England* (4th Ed) para 1422 as follows:

> Conversion exists in three forms. To constitute the first form of conversion there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights, and an intention in doing so to deny the owner's rights or to assert a right inconsistent with them. This inconsistency is the gist of the action. There need not be any knowledge on the part of the person sued that the goods belong to someone else, nor need there be any positive intention to challenge the true owner's rights. The second form of conversion is committed where goods are wrongfully detained by the defendant. A wrongful detention gave rise to an action for detinue before detinue was abolished [by the Torts (Interference with Goods) Act 1977] and now gives rise to an action in conversion. The normal method of establishing a wrongful detention is to show that the plaintiff made a demand for the return of the goods and the defendant refused after a reasonable time to comply with that demand. In many cases, this form of conversion will coincide with the first...The third form of conversion lies for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to the bailor.

Counsel for the defendants accepts that the law in Singapore is the same as the law as stated in the above passage. I think the concession is wrong as detinue is still a common law tort in Singapore and has not been, unlike in England, abrogated by statute and converted into a form of statutory conversion. Therefore, in so far as the plaintiffs have claimed in conversion of the second type, they should properly have claimed in detinue. However, this error is not fatal as the statement of claim contains a sufficient averment under the claim in conversion which, if proved, founds a separate cause of action in detinue at common law. The defendant is also not prejudiced by the plaintiffs' omission to express his claim in detinue as counsel for the defendants is fully aware detinue has been pleaded not as detinue but as a form of statutory conversion. For these reasons, I do not see why I should be prevented from finding for the plaintiffs in detinue if the evidence before me is sufficient to prove detinue.

The plaintiffs' case is as follows: (1) that the defendants converted the goods when, despite the plaintiffs' strict orders to the contrary, they removed the goods from the warehouse and loaded it on board the Kota Agung and/or tranship the goods against the express wishes of the plaintiffs and (2) that the defendants converted (ie wrongfully detained) the goods when they refused, when demanded by the plaintiffs, to unload the goods from the Kota Agung. I have earlier found as a fact that PW1 had not at any time prior to 11 May 1979 expressly instructed DW1 not to remove the goods from the warehouse. Accordingly, I am unable to find that the defendants had done anything wrong in relation to the goods at the time of removal and up to the time when it was loaded on board the Kota Agung. The next point is whether the defendants had done anything wrong in refusing to unload the goods when demanded by the plaintiffs. Were the defendants under an obligation to unload the goods and if so, was the refusal of the defendants a breach of bailment, a conversion or a detinue?

The defendants deny any wrong in refusing to unload on three main grounds: (i) that by virtue of cl 5 of the bills of lading, the defendants were entitled to tranship the goods and having loaded the goods, they would proceed with the transhipment to Khorramshahr; (ii) they were prevented by Indian law and regulations to unload the goods into Porbander.

(i) Were defendants entitled to tranship against plaintiffs' wishes under cl 5?

I have already held that, as a matter of construction, cl 5 did not give the defendants a contractual right or power to tranship once they elected to abandon the voyage, which they had done on the evidence. This defence therefore fails. But assuming that cl 5 did give the defendants a contractual right or power to tranship after abandonment of a voyage, it is still necessary to consider whether this power was capable of being revoked by the defendants at any time before it was exercised. Although neither counsel addressed me on this point, I have no doubt in my own mind that in principle the right or power is revocable. After the abandonment of the voyage, the owners of the cargo are entitled to take delivery of the goods at the place where the goods are landed. An irrevocable power to tranship to the abandoned port of discharge is inconsistent with the rights of the owners. On the evidence, the defendants' right or power to tranship was terminated on 11 May 1979 when the Kota Agung was still loading the remainder of the goods. If the Kota Agung had arrived at Khorramshahr with the goods before the plaintiffs knew of it, a different situation would have arisen. On the facts, the issue must be decided against the defendants.

(ii) Were the defendants prevented from unloading by Indian laws, etc?

DW1 gave testimony on the state Indian law and regulations at Porbander. He was not an expert witness and he worked in Bombay and not at Porbander. He instructed agents to act for JM or the defendants. He said that the bond (D1) was valid for only two months from 16 February 1979 and so it was imperative that the cargo be shipped out lest the bond be forfeited. In my view, that is not correct as the bond period was coextensive with the warehousing period, as otherwise the bond would already have been forfeited at the time of the reloading. Moreover, both periods were capable of being extended and DW1 agreed. On the evidence, I find that none of the acts leading to and including the transhipment of the goods was forced upon the defendants by any circumstance. They were 'forced' to remove the goods from the bonded warehouse only in the sense if they failed to do so in accordance with the terms of the bond (D1), the bond would be forfeited. There is no evidence that this was an impending event. At the material time, there was no demand by the Indian authorities for the removal of the goods from Porbander. The transhipment was entirely voluntary. There was also no physical or other impediment in unloading the goods as they were not over-stowed. Loading was not completed until 17 May 1979, and indeed, the master's testimony was that if had been instructed, he would have unloaded the goods. In my view, all the assertions of DW1 concerning the requirements of Indian law and regulations were never put to the test. When DW1 first received the request to unload, his reaction was not that the unloading was not permitted by laws and regulations but that the goods were already loaded and the ship was sailing the next day.

Even if the defendants were under immediate threat as regards their bond, any payment made thereunder was secured by their line on the goods. It was the plaintiffs who were at risk if they failed to take delivery of their goods at the appropriate time and when requested to do so. This defence also fails.

Was the unauthorized transhipment a form of conversion? Counsel for the plaintiffs has submitted that there was conversion on it because by transhipping the goods against the categorical instructions of the plaintiffs the defendants did a positive wrongful act in respect of the goods in a manner inconsistent with the owners' rights and an intention to assert a right inconsistent with them. The defence is that the gist of the action is an intention to deny the owners' rights and that the defendants did not at any time deny the plaintiffs' rights. In the present case, I do not think that there is any material difference between the ingredient of an intention to deny the owners' rights or to assert a right inconsistent with them. The plaintiffs, as owners, had the right to prohibit the transhipment of the goods which right they exercised. The defendants had no right to tranship the goods but they did. In doing so, the defendants intended to deny the plaintiffs' right (to prohibit transhipment) and also at the same time asserted a right (to tranship) inconsistent with the plaintiffs' right to prohibit it. Not only that, the evidence shows that the defendants in transhipping the goods intended to charge freight and to claim a lien on the goods for freight. This was clearly an intention to assert dominion over the goods until it is delivered to the plaintiffs: *Clerk & Lindsell on Torts* (16th Ed) para 22-13 citing a venerable judgment: 'If a man takes my horse and rides it and the redelivers it to me nevertheless I may have an action against him, for this is conversion, and the redelivery is not bar to the action but shall be merely a mitigation of damages.' In my view, the transhipment was sufficient to constitute conversion of the first type.

What of detinue? Counsel for the plaintiffs says that there was detinue because the defendants refused to unload the goods. Counsel referred to *Howard E Perry & Co Ltd* v *British Railways Board*,[2] where Megarry J held there was conversion of the second type when the defendants in that action refused to deliver to the owners a cargo of steel which was lying in their depot because they feared industrial action by a third party. Megarry J held that an uncertain period of detention, whether long or short, amounted to conversion. I do not think that this decision helps the plaintiffs as the defen-

dants did not actually refuse to deliver the goods to the plaintiffs. On the evidence, the plaintiffs had made no demand for delivery of the goods to them, but merely for discharge back into the warehouse into the custody of the defendants. The position here was that the defendants insisted on retaining possession of the goods on board the Kota Agung without the consent of the plaintiffs rather than in the warehouse with the plaintiffs' consent. I do not think that there was any detinue in these circumstances. Indeed, but for the fire at Khorramshahr, the goods might have been carried back to Bangkok, as arranged, and the question of detinue would never have arisen. There is, to my mind, no distinction in principle between the two situations.

On the evidence, it is clear that the defendants had no right to retain possession of the goods on board the Kota Agung. Their wrongful possession constituted trespass to the goods. The goods were lost whilst they were still in unlawful possession. I think the defendant's position was, by analogy to a bailee's position in *Mitchell* v *Ealing London Borough Council*,[3] that of insurers and in the events that happened, the defendants were liable for the loss of the goods, whether or not they were negligent.

Issue 3: Breach of duty and/or negligence in transhipment

The plaintiffs have also claimed against the defendants as bailees who were negligent or in breach of duty in the performance of the transhipment of the goods, whereby the same was totally lost by fire on board the Kota Agung. The law is well established. The onus is on the defendants to establish that the goods were lost without their negligence: see *Port Swettenham Authority* v *Wu*.[4] In *Philips & Co (Smithfield) Ltd* v *Clan Line Steamers Ltd*,[5] where a cargo was shipped in good order and condition but was delivered damaged, Atkinson J said:

> It is not necessary for the defendants to establish exactly why and how the damage occurred, provided that they can disprove negligence; but of course, it is not easy to do that unless they can establish some reasonably possible alternative explanation. If the damage is entirely unexplained, it is difficult to see how the onus can be discharged.

In the present case, there is no mystery as to the cause of the damage. It was the fire. The issue is therefore whether the fire occurred as a result of the negligence or breach of duty of the defendants or their servants. I think that as the fire started on board the Kota Agung which was in the possession and control of the defendants, the onus is on them to prove that the fire occurred without their negligence. The evidence showed that the ship began discharging its cargo at Khorramshahr at 1615 hours on 17 June 1979. Discharge took place in two shifts for 0700 hours to 1200 hrs and from 1500 hrs to 1900 hrs. On 9 July 1979, the workers ceased work at 1200 hrs and went ashore for lunch. According to the master's protest, at 1330 hrs, a member of the crew, Bandary, saw a fire had broken out in hatch no 3, lower hold. Help was summoned. They tried to close the hatch but there was no power. Fire trucks and fire fighting floats came soon after but they could not put out the fire which also started in no 2 hatch. The master could not give any explanation for the fire. He said that 'No Smoking' signs were displayed at the hatches and the chief officer had inspected the hatch shortly after 1200 and noted nothing amiss.

A survey was done by one NA Leonard (PW2) of Johnson's Sons & Mowat, marine surveyors, for and on behalf of The Salvage Association on or about 18 July 1979. His evidence was as follows:

> According to stowage plan, BD 118, Kenaf stand up to steel coamings: which were exposed. It was very hot. I could feel heat on soles of feet. I placed thermo on block of wood: 60°C: atmosphere temperature 45°C. I discussed cause of fire with master: BD 176. He agreed. Exposed to severe sunlight from 10am to about 3-4pm. Steel coamings would be very hot if exposed to sun. Kenaf in dry condition: inflammable: my view, the steel coamings set fire to a few bales and spread. Hottest time in Khorramshahr was about 11-12 noon. Mid-day break in Khorramshahr between 1200-1500 hours. Fire took place at 1330 hours. It would have been prudent to close hatch. There was also general cargo. Should be a regular practice especially for longer period like three hours. ... Kenaf is their name for jute.
>
> Matting: use of paper usually: dunnage is using planks: reason for matting and dunnage is to protect from shipside sweat: dunnage would protect kenaf from side of ship.
>
> BD 118 — Empty space next to hold 3 is engine room. That part of bulkhead would heat up but not to dangerous level.
>
> For kenaf to have caught fire, must have been touching steel coamings.
>
> Can't say when cargo was separated from bulkhead next to engine room.
>
> Likely cause of fire: extreme heat heating metal which was touching cargo.
>
> There were suggestions of sabotage: Investigated this. Discounted: other causes: cigarettes discarded in open hatch: seats of fire. No possibility of spontaneous combustion.

The evidence of the master was that he had taken every precaution against the occurrence of fire. His evidence was as follows (pp 57-57 N/E):

> I took into account possibility of fire: so I took extra precautions: exhibited no smoking signs: instructed ship's officers and stevedores; fire hoses were connected to fire mains along the hatches where kenaf stowed: fire extinguishers put out on the ready near the gangway. I arranged for a fire watch to be kept while loading: one watchman in each hold. Officers went round deck to ensure no smoking: also officer on duty at all times. .....
>
> On the way to Muscat, I held a comprehensive fire drill and gave crew talking too. Arrived in Muscat on 20 May 1979 and began to load cargo. On opening hatches, chief officer drew my attention to heat emanating from kenaf in

all the holds. After hatches opened, heat disappeared after a short while. Heat problem but not excessive. Weather was hot. At Muscat until 10 June 1979 when we sailed for Khorramshahr. We had a fire drill on way to Khorramshahr.

We were aware of state of civil unrest in Khorramshahr. Trying time: we could hear firearms being discharged and buildings on fire in Khorramshahr as we approached: we also heard fighting on otherside of riverway.

...I took particular care: summoned officers and agent to my cabin and discussed situation with agent with regard to civil disturbance and possible damages to vessel: concerned with unspecified type of attack on vessel: instructed officers to be alert: everything on the ready, including fire fighting equipment: told agent to instruct his overseer as to danger from fire and large notice was exhibited in gangway in Farsi to this effect.

Fire equipment connected: there was water on deck: fire extinguishers ready: agent provided one watchman for each hold: also gangway watchman: chief officer organized crew into watches: at all times, crew patrolling deck: also traditional duty officer: general watch but specifically instructed to look for fire.

Loading between 7am to 12 noon: lunch: resume 3pm until 7 pm: there was disturbance in the port area at all times. It was very hot and dry at noontime: there was also wind from desert.

At lunchtime, hatches were left open: reasons: (1) at all times, we were concerned about heat from cargo: need for ventilation: there was complaint of pilferage but we considered heat problem more serious: (2) if hatches closed, it would have been unworkable inside.

I did not consider the sun's ray as a potential danger to the cargo. During lunch break, a fire watch was kept, one at each hatch: my own officers watching around and watchman at gangway.

The master also denied that the goods had been stowed in such a way as to touch the underside of the steel coaming or the centre steel post in hatch no 3. He said that the centre bulkhead and post was wrapped with matting and that the topside of the goods did not touch the deck or other steel structure, and therefore the fire could not have been caused by the heating up of the steel structures as postulated by PW2. He also said that the goods were not self-combustible nor were they contaminated with inflammable contaminants. If the master's evidence is accepted, then the fire should not have started at all and yet it occurred. PW3, an expert mariner, said that the goods was classified as highly combustible. The evidence shows that the goods were in a very dry condition (part of it having caught fire twice at Porbander, the first after unloading and the second time just before reloading, and the same having stored for more than three months) and would easily ignite. However, on the evidence, I am unable to determine the cause of the fire. But, I am able to find that the opening of the hatches during the lunch break for three hours substantially increased the risks of fire occurring to the goods. The master was fully aware of the prevailing political and labour conditions and that the ship could be attacked or subjected to accidental damage. When asked if the civil commotion did not bother him, his reply was that if attacked, he would have time to close the hatches. In fact, when the fire started, he did not have time to close the hatches. He gave a number of reasons for leaving the hatches open. The first is that ventilation was necessary. I find this reason difficult to accept as the hatches were opened each day from 0700 hrs for unloading, and therefore the holds would have ventilation for at least five hours before the lunch break at 1200 hrs. The second reason is that if the hatches were closed it would have been unworkable inside. Again I have difficulty in accepting this reason as, on the master's evidence, it would have taken about half an hour for the heat to dissipate if the hatches had been closed. A third reason was that the wharf labourers were sensitive to the working conditions. I also find this reason difficult to accept, as there is no reason to believe that the workers were not used to working in such conditions. In my view, the master was wrong in being more concerned with the ventilation than with the civil commotion occurring daily at the port area. I agree with PW3's evidence that as a general operation rule of prudence, when cargo is not needed, the hatches should be closed. All the more so in the circumstances of this case. The master, in my view, increased the risk of damage to the cargo by not closing the hatches during the long lunch break when it was most unlikely that there would have been any crew around to keep watch on the ship at all the open hatches, and that the master was negligent in not closing the hatches when doing so would have prevented any accidental ignition of the goods. In my view, since the fire was not caused by self-combustion of the goods or the heat of the sun either on the goods or on the ship, it could only have been caused by an external source deliberately or accidentally. This source of fire was within the contemplation of the master and he contemplated it. Accordingly, I find that he was negligent or in breach of duty in not closing the hatches during the lunch break or in leaving it open for such a long period of time. In any case, the defendants have failed to discharge the onus of proving the probable cause of the fire. I view with scepticism his evidence that there was a watchman for every hold. In fact, there was no one at hatch no 3 when the fire was first seen by Bandary, the gangway watchman and by the time he summoned the crew at hatch no 4, it was too late to stop the fire by any means. Even if I am wrong in finding the master negligent, I am of the view that the defendants in failing to prove the probable cause of the fire has not discharged the onus of proving that their servants were not negligent in allowing the fire to occur in the circumstances it did.

I consider next the defendants' position as bailees of the goods on board the Kota Agung without the

consent of the plaintiffs. The defendants' duty was to keep the goods in the warehouse at Porbander until the plaintiffs took possession of it. In insisting on keeping the goods on board the ship and delivering the goods to the plaintiffs at Khorramshahr, the defendants did so at their own risk. The defendants became insurers of the goods: see 2 *Halsbury's Laws of England* (4th Ed) para 1519.

Merchant Shipping Act (Cap 179, 1985 Ed), s 271

The defence also relies on s 271 of the Merchant Shipping Act (Cap 179, 1985 Ed) ('the Act') which provides as follows:

> The owner of a British ship shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following case:
>
> (a) where any goods, merchandise or other thing whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship.
>
> (Under s 3 of the Merchant Shipping Act 'British ship' is construed as 'Singapore ship'.)

The defence is that even if the master were negligent the defendants would not be liable if the loss occurred without their actual fault or privity, the onus of proving which is on the defendants. Counsel refers to the following authorities: *The 'Lady Gwendolen'*,[6] *Asiatic Petroleum Co Ltd* v *Lennard's Carrying Co Ltd*[7] and *Tempus Shipping Co Ltd* v *Louis Dreyfus & Co Ltd.*[8] Counsel contends that on the evidence the Kota Agung was a seaworthy vessel and that it was under the control and management of a qualified and experienced master and that it was not their responsibility to give specific instructions to him in the handling of the ship and the cargo. He refers also to *Virginia Carolina Chemical Co* v *Norfolk & North American Steam Shipping Co*,[9] *The 'Rostellan'*[10] at p 126 and *Beauchamp* v *Turrell*[11] at p 215.

The plaintiffs' case is that: (i) there was no evidence that the vessel was not seaworthy as DW3 who testified to such effect was only the traffic manager at the material time and that he was not familiar with the operational aspects of the vessel; (ii) the defendants have not been able to give a satisfactory explanation for the cause of the fire.

As to (i), I find that the plaintiffs have not proved that the ship was unseaworthy. As to (ii), the fact that a fire occurred does not prove that the ship was unseaworthy. It cannot be disputed that the Kota Agung was fully classified in all respects at the material time. I do not think that the decision of *Pendle & Rivett Ltd* v *Ellerman Lines Ltd*[12] relied upon by counsel for the plaintiffs is relevant to the point. In that case, MacKinnon J held that by reason of the wholly inexplicable conflict of evidence on both sides, the shipowners had not discharged the onus of proving that the short delivery was not due to their actual fault or privity under art 4 r 2 of the Carriage of Goods by Sea Act 1924. I agree with counsel for the defendants that *Pendle*'s case[12] has no relevance to the present case on the ground that the exemption clause in the Hague Rules operate in a different way from s 271 of the Act. The latter exemption is based on public policy (see the Preamble to 26 George III C 806 (1786) on which the Singapore Act is based). The policy was to exempt shipowners from liability for any loss or damage to goods as a result of any fire happening to or on board the vessel. The exception to this exemption was the actual fault or privity of the shipowner. Under the Hague Rules, the shipowner was vicariously liable for the negligence or wrongful acts of its servants, but not under s 271. It must follow that the defendants' inability to explain the cause of the fire does not mean they have not discharged the onus of proof that the loss occurred without their actual fault or privity. On the evidence I am satisfied that they have discharged it for the purpose of s 271 of the Act.

This finding merely means that if s 271 of the Act were applicable, it would have provided a defence to the defendants in respect of the negligence of the master. But I am of the view that s 271 has no application in the present case where the cargo is carried on board a ship without the consent of the owners of the goods. Although, in the present case, the goods was, initially, taken or put on board lawfully in the sense that it was not a trespass to the goods, it became a trespass once the plaintiffs objected and required that it be unloaded. I have found that there was conversion of the goods when the transhipment was effected and also breach of bailment when the defendants insisted to keep the goods on board the ship. Although the transhipment to Khorramshahr was not the causa causans of the loss, it was a sine qua non of the loss. Bearing that in mind, I do not think the legislature could have intended (it being contrary to good sense and justice) s 271 to protect a shipowner in a case where he wrongfully takes in or puts on board his vessel goods which is subsequently destroyed by fire on board the ship. I hold that s 271 has no application except where the goods are lawfully taken in or put on board a Singapore ship.

For the above reasons, the plaintiffs succeed in their claim and there will be judgment for the plaintiffs in the sum of US$339,822 with interest thereon at 8% pa and costs.

Claim allowed.

Solicitors: *Godwin & Co*; *Drew & Napier.*

Reported by *Jeff Leong Pak Lim*